

**UNITED STATES DISTRICT COURT OF THE
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

IN RE: DIGITEK PRODUCT
LIABILITY LITIGATION

MDL Case No.: 2:08-md-1968

THIS DOCUMENT RELATES TO:

McCornack v. Actavis, 09-cv-0671
Vega v. Actavis, 09-cv-0768

PLAINTIFFS' RESPONSE TO COURT ORDER RE SEALING (See Pacer Docket No. 561)
AND DECLARATION OF TERRY KILPATRICK IN SUPPORT

Plaintiffs are not the proponents of sealing the documents identified in the Motion to Seal (Pacer Docket No. 545). Plaintiffs' filed a Motion to Seal pursuant to PTO #12 because no agreement could be reached about removing the confidential designation of numerous documents before they were required to file their various Oppositions to Defendants' case-dispositive motions. (Kilpatrick Decl. ¶2.) Likewise, many of the depositions and expert reports contained information obtained from confidential records and Plaintiffs submitted the documents in the manner required by PTO #12. (Kilpatrick Decl. ¶2.)

Plaintiffs' position is that none of the documents should be sealed. Plaintiffs contacted Defense counsel prior to filing the documents and have met and conferred with them about this issue several times since. (Kilpatrick Decl. ¶2.) Today, September 6, 2011, Defendants responded that with one exception the documents need not be sealed. (Kilpatrick Decl. ¶3.) The one exception is Plaintiffs' Exhibit 217. Defendants have indicated that they will seek to redact much of the document to eliminate reference to all drugs mentioned in Exhibit 217 except Digitek. Plaintiffs have no objection to sealing this one document in the public record but they

do object to the proposed redaction as there is probative information in the document that Plaintiffs intend to rely upon in opposing Defendants' Motion for Summary Judgment. For example, there are numerous issues concerning blend uniformity, compression, and tablet width of non-Digitek products that bear directly on the issues presented in this litigation. (Kilpatrick Decl. ¶3.)

Plaintiffs have agreed that they will not display Exhibit 217 for public viewing nor reference any specific drug by name at the hearing. (Kilpatrick Decl. ¶3.) However, Plaintiffs do intend to rely on the document as support for their Opposition to Defendants' Motion for Summary Judgment and therefore oppose any redaction.

Respectfully Submitted.

Dated: September 6, 2011

/s/ Terry Kilpatrick
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DECLARATION OF TERRY KILPATRICK

I, **TERRY KILPATRICK**, declare:

1. I am an attorney licensed to practice law in the State of California, and employed by the Ernst Law Group, counsel for Plaintiffs Kathy McCornack, Daniel McCornack, and Ralph McCornack in the above-captioned action and related proceedings in MDL No. 1968. I submit

this declaration in support of Plaintiffs' Response to Court Order re Sealing. I have personal knowledge of the matters stated in this declaration. If called upon to do so, I would testify in accordance with this declaration.

2. Prior to filing Plaintiffs opposition papers to Defendants' various case-dispositive motions, I and lead counsel Don Ernst spoke with Actavis defense attorney Matthew Moriarty to ask if he had any objection to our filing numerous documents marked confidential. It was our belief that most if not all of the documents were either marked "confidential" or contained information obtained from documents marked confidential, and thus were confidential pursuant to PTO #12. Mr. Moriarty stated that he would need additional time to review all of the documents and confer with his client about their position on the confidential nature of the documents. Likewise, we attempted to contact counsel for Mylan but were unable to speak with them prior to our deadline for filing our opposition papers. Immediately after filing the various documents as required by PTO #12, Mr. Ernst and I continued to meet and confer with defense attorneys for Actavis and Mylan to ask if they were willing to have all of the documents filed in the public record without the need for sealing.

3. On September 6, 2011, I received an e-mail from defense counsel stating that with one exception, the documents need not be sealed. The one exception is Plaintiffs' Exhibit 217. Defendants stated that they will seek to redact much of the document to eliminate reference to all drugs mentioned in Exhibit 217 except Digitek. Our clients have no objection to sealing this one document in the public record, but they do object to the proposed redaction as there is probative information in the document that Plaintiffs intend to rely upon in opposing Defendants' Motion for Summary Judgment. For example, there are numerous issues concerning blend uniformity, compression, and tablets out of specification with regard to thickness of non-Digitek products

that bear directly on the issues presented in this litigation. Plaintiffs' counsel sent an e-mail to defense counsel stating that we would agree to not display Exhibit 217 for public viewing nor reference any specific drug by name in the public record at the upcoming hearing. However, Plaintiffs do intend to rely on the document as support for their Opposition to Defendants' Motion for Summary Judgment and therefore oppose any redaction.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on August 5, 2011 in San Luis Obispo, California.

Dated: September 6, 2011

/s/ Terry Kilpatrick
Terry Kilpatrick (CA. State Bar No. 163197)

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2011, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: September 6, 2011

/s/ Terry Kilpatrick
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